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IN THE

Supreme Court of the United States

October Term, 1960

No. 605

ROBERT MORRIS,

Petitioner,

vs.

CITY OF SAINT PAUL,
STATE OF MINNESOTA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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CITY OF SAINT PAUL,
STATE OF MINNESOTA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a Writ of Certiorari issue, to review the opinion and decision of the Supreme Court of the State of Minnesota, made and entered July 22, 1960, and the order denying reargument and rehearing and the judgment made and entered pursuant thereto on the 27th day of September, 1960, in the above entitled case, wherein it was entitled City of Saint Paul, Respondent, vs. Robert Morris, Defendant, Appellant.

1. The report of the opinion and decision rendered in the Supreme Court of the State of Minnesota is to be found in —— Minnesota Reports at page ——, and in 104 Northwestern 2d, page 902. A copy of said opinion, by Chief Justice Roger L. Dell, together with an able dissenting opinion by Justice Lee Loevinger, file 37909 (83), is hereto appended.

2. September 27, 1960, is the date of the judgment and of its entry.

3. Petition for reargument was filed, and stay of proceedings thereon was granted on August 11, 1960. The petition for reargument was denied; and the stay was vacated, and judgment was entered on September 27, 1960.

4. Petitioner submits jurisdiction to review the judgment herein is conferred on this Court, because of its unconstitutionality under the United States Constitution, Amendment XIV, as the conduct of the petitioner, defendant below, was not clearly encompassed within the terms of Ordinance No. 438.02, entitled Riots, invoked for his punishment, and was therefore invalid. Further that the entire proceedings were violative of petitioner's constitutional rights, under the Fourteenth Amendment, and of his freedom of speech in protest of grossly illegal police acts, and the ordinance as applied was unconstitutional. That there was failure of a complaint stating an offense under it; nor could it be stretched to have a simple swear word be deemed disorderly conduct under it.

5. The questions presented for review are:

1) The defendant is entitled to a complaint, in Municipal Court, to inform him of what he is charged; and a specification of what ordinance or statute he is charged with violating, and in what particular.

2) That a "tab" charge of only "disorderly conduct" is insufficient to try and convict a defendant, and does not inform him of the offense; nor is it sufficient as a sworn complaint.

3) That a purported ordinance, to be valid and constitutional, as sought to be applied in the present case, cannot be vague and uncertain, but must inform the ordinary man of what the elements of the offense are and what is proscribed as to acts and conduct; and if it is to designate "disorderly conduct" must express such an offense, and what is meant thereby.

4) That where the City of Saint Paul, Minnesota, has an Ordinance 469.02, which is entitled "Disorderly Conduct" and covers "rioting, quarreling, fighting, revelling, drunkenness or any other disorderly conduct, in any house or premises * * * occupied, calculated to disturb the neighborhood or annoy travelers or others," such an offense as disorderly conduct defined must be in or refer to disorderly houses, as such; and precludes and negates a charge of "disorderly conduct" under a "Riot" ordinance, 438.02, for simple use of an improper word, or for undefined wrong conduct away from any house or premises.

5) That use of words of protest, or an unsavory word, in exasperation and frustration, upon flagrant and unlawful violation of rights by a police officer making arbitrary and illegal arrest in gross violation of law by him, comes within the exercise of freedom of speech.

6) That a police officer, as an officer of the peace, must uphold the law, and is not one to be caused to incur resentment, whereby he should breach the peace, or be affected by a mere word, or by acts of what is the long-established understanding of what constitutes "disorderly conduct"

7) That a charge of disorderly conduct is not some matter of minor, local, municipal or village concern, but is of statewide and general application, particularly where, as is the case in the State of Minnesota, there have been enacted several statutes defining what constitutes disorderly conduct; and the defendant should be given the constitutional protections of a trial for a crime, a complaint on actual knowledge and sworn to upon oath, a jury trial, presumption of innocence until overcome beyond reasonable doubt; and where tried by the Court, findings of fact and conclusions of law, to justify the judgment of guilty. All of these were denied herein, and should be enforced, as unconstitutional denial of due process of law. It is submitted here, there is an entire lack of any evidence to base a conviction on, and no valid ordinance on which it could rest.

6. The facts are:

Robert Morris, petitioner, and his half brother, Booker T. Parker, age 19, both colored men so-called, of the Negro rase, on January 10, 1959, walked from their home over to Perkins Chicken Shack cafe to get some sandwiches to bring home, and finish playing cards together. They had just entered the cafe, at Central and Western Avenues in the City of Saint Paul, where a number of Negro people were eating, when in walked four white police officers, in charge of Detective Earl H. Harken, of the "Morals Squad." Said Harken arrested a man and woman for suspicion of "consumption of liquor in a place not licensed therefor," although they had just come in and had no opportunity to observe any violation of law. Then said Harken arrested Booker T. Parker for no reason other than that he had

happened to sit down at a table opposite said couple while waiting for the waiter to take his order for sandwiches.

Morris asked one of the two uniformed officers, with Harken, four or five times, why they were arresting his brother, who hadn't done anything, why were they picking on the colored people, why didn't they go and pick on the white people—all in so quiet a voice that none but said officer heard him. Said officer testified he did not answer because he was there only to assist Harken. Outside, Morris repeated the same question, in a quiet and orderly manner, to Detective Harken, who turned and told him to "shut up." Thereupon, in a still quiet voice, so that Harken could not hear anything but the so-called swear words, Morris asked, why do you pick on the colored people, my brother didn't do anything, "that's the trouble with you white m—— f——s, you can't even speak to you." Harken arrested Morris for using foul language, then booked him for "disorderly conduct."

7. On the trial, a jury trial was denied, also a requested complaint, and specification under what the charge was laid; and defendant was tried by the Court, without a jury, on a "tab charge of disorderly conduct," and found guilty thereof. On motions for findings of fact, and for dismissal, and a judgment of not guilty, or for a new trial, same were all denied by the trial Court.

8. The questions involved were raised at the arraignment in police court, before the plea of not guilty; again at the trial; and further before the Court on Motion for Dismissal, at the close of the State's case; and further on Motion for Judgment, or for new trial.

9. ARGUMENT. The reasons relied on for allowance of the Writ of Certiorari herein are:

1) The Ordinance 438.02, entitled Riots, upon which the prosecution was based, does not clearly encompass, by its terms, any offense of "disorderly conduct," nor the alleged conduct of the defendant, petitioner herein, for whose conviction it was invoked.

2) Petitioner has been denied grossly his constitutional and lawful rights, in the premises; there clearly has been plain error; and he has been injured and has suffered impairment of his rights substantially and grievously.

3) The ordinance relied on does not in itself state any alleged offense of disorderly conduct, and is unconstitutional as applied to petitioner in the premises.

4) The ordinance entitled Riots cannot include "disorderly conduct" and thus violate Minnesota Constitution, Article IV: "Laws to Embrace Only One Subject. Sec. 27. No law shall embrace more than one subject, which shall be expressed in its title."

5) The conviction, and the proceedings, and the judgment of the Minnesota Supreme Court herein violate the Minnesota Constitution, Bill of Rights, Article 1, Section 7: "No person shall be held to answer for a criminal offense without due process of law, * * * nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law." Section 3: "Persons may freely speak."

6) The judgment further violates the United States Constitution, and is contrary to the intent of Article 3, Section 2, for jury trial; and Amendments, Article V ("nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law"); and Amendment VI: "In all criminal prosecutions the accused shall enjoy the right to a

speedy and public trial by an impartial jury * * * and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him"; and is in direct violation and contradiction of Amendment I, freedom of speech and petition for redress; and of Amendment XIV: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Under Section 5 thereof, Congress, under its power to enact, has enacted civil rights laws, all now in force, and under which this particular judgment of conviction should not stand, unchallenged, but should be set aside.

7) Petitioner Robert Morris states that at present he resides at 483 St. Anthony Avenue, in the City of Saint Paul, Ramsey County, Minnesota, and presently is employed as an automobile cleaner, and motor steamer and cleaner, by the St. Paul Seat Cover Company in Saint Paul. That this case, to him, did not involve simply a fine of $25 or two days in the workhouse. That at the time of the grossly illegal arrest of his 19-year-old half brother, and of what he claims was his illegal and unwarranted arrest herein, he had previously been received at Stillwater Penitentiary on a 10-to-20-year sentence and was granted his first parole on June 28, 1958. After his arrest herein for "disorderly conduct," on January 10, 1959, he was returned to the penitentiary on February 11, 1959, and has since been released on parole June 22, 1960, after over 17 month imprisonment. Among the things for which he appeared not to make a good adjustment and violated several of his parole regulations were: "driving without a license, purchasing an

automobile without permission, *being arrested for disorderly conduct* (herein), being convicted of careless driving, driving without liability insurance, not maintaining employment, and leaving the state without permission." It appears that his being harassed cruelly by the arresting officers, Detectives Earl H. Harken and Frank L. Martin, of the "Morals Squad," along with the illegal arrest of his brother, could have only a frustrating influence on his living a worthwhile life; and he is now steadily at work again, bettering himself.

8) There have been numerous and various other instances of harassment by said so-called morals squad members, in the Rondo area, largely populated by citizens of the Negro race, and many arrests "upon suspicion." It is essential to the comfortable and undisturbed peaceful living of Saint Paul and other citizens that unlawful arrests, whether under the Riot ordinance in question, or other vague charges, be determined and terminated.

We sincerely and respectfully petition that this Court hear and pass upon these matters, by issuance of its Writ of Certiorari herein.

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St. Paul, Minnesota
November 22, 1960

APPENDIX A

STATE OF MINNESOTA
IN SUPREME COURT

No. 83

CITY OF ST. PAUL, *Respondent*

37909 vs.

ROBERT MORRIS, *Appellant-Defendant*

PETITION FOR REARGUMENT

Robert Morris, appellant, herewith respectfully petitions this Court for a reargument and rehearing of the above matter, and for a reconsideration of the opinion of this Court filed on July 22, 1960.

1. Defendant submits that an effort to charge him with disorderly conduct under the St. Paul Municipal ordinances is fallacious. That such a charge against him does not lie under the ordinances of the City or the laws of the State of Minnesota or at common law. That there is no such offense as "disorderly conduct" for the mere expression of an improper word in the absence of something which would disturb and breach the peace or cause resentment to breach of the peace.

2. It is submitted that "disorderly conduct" is set forth under the St. Paul Ordinance 469.02 which reads as follows:

> "Disorderly Conduct. No person or persons within the City of St. Paul shall commit or suffer to be committed, in any house or other building or premises by him, or her, or them occupied, any rioting, quarreling, fighting, revelling, drunkenness, or any other disorderly conduct, calculated to disturb the neighborhood, or annoy travelers or others."

Obviously, the defendant could not be charged thereunder as the alleged use of the words was not within any building premises, and the defendant could not possibly be deemed guilty of such disorderly conduct.

3. The other St. Paul City Ordinance, 438.02, reads:

> "Riots. Any person or persons who shall make, aid or countenance, or assist in making any noise, riot, disturbance or improper diversion, to the annoyance or disturbance of the citizens or other person or persons in said city; or who collect in bodies or crowds in any street or public place in said city, so as to obstruct public travel thereon, shall be guilty of a misdemeanor."

We submit it is impossible, legally, to base an arrest, complaint against, or conviction, of this defendant under this ordinance, because of a simple expression of an offensive word, without anything else whatsoever of a disorderly nature. The ordinance is void of any definition of what is disorderly conduct, and it refers only to what it is entitled, namely, Riots and acts akin thereto.

4. It is submitted the Ordinance 438.02, Riots, is unconstitutional under the Minnesota Constitution. To begin with, under Article IV, Sec. 27: "Laws to Embrace Only One Subject. No law shall embrace more than one subject,

which shall be expressed in its title." The ordinance in its title refers to "Riots" and does not comply with said Sec. 27 to embrace, and cannot cover "disorderly conduct" by use of improper language. Nowhere in said ordinance is there a reference to use of words or language or the words "disorderly conduct."

5. The Minnesota Constitution, in Article IV, says: "punish for disorderly conduct, Sec. 18. Each house may punish by imprisonment, during its session, any person, not a member, who shall be guilty of any disorderly or contemptuous behavior in their presence, but no such imprisonment shall at any time exceed twenty-four hours."

This is referred to merely to show that the only reference to disorderly behavior is in connection with the session of the legislature.

6. The Bill of Rights, Article I, of the Minnesota Constitution delimits things which are lawful and unlawful with respect to a person's rights. Here the defendant was merely charged with disorderly conduct under a tab charge and there was a refusal to furnish a complaint and specify wherein and whereby the defendant was charged. It was not specified whether it was under some state law or some particular city ordinance, nor the nature of the offense, nor was there specified the where and the why; and the defendant was forced to go to trial for "disorderly conduct." He was entitled to know what the nature of the alleged offense was, whether if was violation of an ordinance or statute or the common law, and what the ingredients and specifications of the offense might be. He was denied a jury trial and he was denied the right to the last argument in the trial as provided by Minnesota statute. This was all in

violation of the right of the accused in criminal prosecution under Article I, Sec. 6, which provides that the accused shall enjoy trial by jury and be informed of the nature and cause of the accusation and be confronted with the witnesses against him; and Sec. 8 which provides that he ought to obtain justice freely and without purchase; completely and without denial; promptly and without delay, conformable to the laws. Also, Sec. 4 which provides that all persons may freely speak, and write and publish their sentiments on all subjects being responsible for the abuse of such rights. Also Sec. 7 which provides:

> "No person shall be held to answer for a criminal offense without due process of law, and no person for the same offense shall be twice in jeopardy of punishment, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law."

7. It is submitted that in this case the defendant was flagrantly deprived of his rights and liberties under the provisions of the Bill of Rights of the State of Minnesota. It should be noted that this Court, in its decision, nowhere makes mention, of the admitted facts under the complete record herein, that the use of the improper words by the defendant was under the greatest provocation by the four white police officers acting illegally and unconstitutionally, in abject denial of the rights of colored citizens. Further, that said officers, without any basis in reason or right of law, had grabbed defendant's 19-year-old half brother and arrested him when he in no way had committed any offense. The officers not only had never seen him commit any offense, but even didn't know who he was but "took him along" when they were arresting a couple who they thought might

have put a little liquor in their cups of coffee in a restaurant. Defendant had the right, to petition under the law, to inquire why his brother was being arrested; and it occurred only after a half dozen quiet inquiries and entreaties as to why said white officers were arresting and bothering colored people, including his brother, when he had done nothing. Even then it was only when the Detective Harken who said he couldn't even hear what the defendant was saying, and which, it must be assumed, was in a quiet tone, except that after he told him to shut up he was able to make out the word's "That's the trouble with you so-and-sos, you can't even speak to you," all in a quiet and orderly fashion throughout.

8. It is further submitted that the so-called Ordinance 438.02 "Riots" is unconstitutional under the Constitution of the United States Amendments, Article 4, which states:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated."

And Article 5, which states "nor shall any person be deprived of life, liberty, or property without due process of law." And Article 6 which provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury, and to be informed of the nature and cause of the accusation, and to be confronted with witnesses against him. And Article 14 which provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." [and]

"Sec. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

9. It is submitted that the St. Paul City Ordinance 438.02 "Riots" violates the provisions hereinbefore set forth of the United States Constitution, and in this present case in which it is sought to charge the defendant with an offense of "disorderly conduct" by the mere use of an offensive word, without any attendant disorder or other unlawful circumstances whatsoever.

10. It is also submitted that the prosecution and the proceedings against the defendant in this present case are in violation of the aforesaid provision of the United States Constitution: in that he was denied due process of law; that he was illegally arrested and prosecuted and was not informed properly of the nature of the offense. That he was denied freedom of speech, and the right to petition, particularly when the expression that he used was only under great provocation and exasperation, provoked by the illegal and wrongful acts of the four white police officers. It should be clear that a man, under the Federal Constitution and laws, has a right to inquire why police officers, acting by force of their authority and clothed with all the force of police of the City of St. Paul and State of Minnesota, engaged in deliberate and abject abuse of the rights of citizens.

11. It is also submitted that there should be no misunderstanding or question under the record that the four officers were so-called "white"; and that this defendant and his half brother who was being illegally arrested, and the other couple, being arrested also on suspicion, were in fact "colored," and that the restaurant was a so-called "colored" restaurant. It was apparent they were being picked on and abused because of their race. Further, in violation of

the United States Statutes of Civil Rights and the Statutes of the United States which have been lawfully enacted and are in effect to enforce and carry out the provisions against violations of rights under Amendments IV and XIV of the United States Constitution.

12. Reference has been made in the opinion of this Court, to the case of Pavish v. Meyers, 129 Wash. 605, 225 p. 633, 34 A.L.R. 561, and the authorities cited therein. The reading of said case is to the effect:

> "It would be an unfortunate state of affairs if a policeman could provoke another to commit a breach of the peace, arrest him, and then, when sued for damages for the arrest, defeat the action by simply showing that because the other was breaching the peace the arrest was lawful and justified, and that provocation would be immaterial and beside the question. Such a doctrine would permit the officer to take advantage of his own wrong. Under such a theory police officers would have it in their own power, under color of authority, to reap private revenge. If a policeman desired, out of malice, to arrest a private citizen, all he would have to do would be to use such abusive and contemptuous language to that person as that he would, because of his human nature, resent the remarks, and then the officer could legally arrest him because he had breached the peace, and defend in an action for damages on the ground that the arrest was lawfully made."

Further, the Court held, page 565:

> "Plainly, testimony of this character would tend to enlighten the jury on the question of whether the officer's conduct tended to provoke that of appellant. If, under the testimony, the jury should believe that respondent Meyers so acted as to be the cause of appellant's conduct and to justify it, then, so far as this

action is concerned, the arrest would be wrongful and unjustified."

It appears clearly that any discussion in the case as to use of words being "disorderly conduct" is obiter dicta and the case itself involved an inflamatory accusation that the officer was peddling whiskey (in violation of law) wholly in response to the officer's holding his nose and saying that the plaintiff's fish market smelled. The arrest was held in fact illegal.

13. It should be noted that the various cases set forth in 34 A.L.R. Annotations largely refer to cases of use of opprobrious language accompanied by violent and disturbing conduct.

14. Therein mention is made, page 567, that

"The offense of using, without provocation, opprobrious words or abusive language to or of another in his presence, tending to cause a breach of the peace, may be committed by the use of such words to or of an officer who has the user at the time in legal custody. Elmore v. State (1914) 15 Ga. App. 461, 83 S.E. 799. Compare People v. Lukowsky (1916) 94 Misc. 500, 159 N.Y. Supp. 599."

15. The Court also suggests that we compare "People v. Lukowsky, 94 Misc. 500, 159 N.Y.S. 599," upon which we rely, with "People v. Fenton, 102 Misc. 43, 166 N.Y.S. 725. This case hardly appears to be in point as this did not involve use of improper words but rather was a refusal to obey a traffic officer, and it was only in the Bronx County Court on appeal from the Eighth District Magistrate Court rather than a decision of a court of last resort. There the New York police officer directed the defendant to discontinue driving a truck of ashes in an unsafe condition and

a menace to other vehicles and warned the defendants to stand still until the truck could be fixed and safely moved. Among other things they said to the officer, "Where the hell do you get off, to tell us what to do? We'll do as we like, we don't care what you say," and they were fined $3.00. The Bronx County judge stated, "In my opinion such language, under the circumstances, addressed to a police officer in the proper performance of his duty, was conduct tending to breach the peace."

16. Reference is made to State v. Appling, 69 Am. Dec. 469, in 2 Wharton's Criminal Law and Procedure, Sec. 805, p. 66. The charge was that on August 26, 1856, in the hearing of a large assembly of males and females defendant used obscene and indecent language by asking some of the males, (the words being too vulgar to set out in the Opinion,) and he was found guilty of open and notorious acts of public indecency, grossly scandalous to the manifest corruption of the morals of said assembly. The Court stated, we have no statute for punishing a person for use of the vulgar, indecent and obscene words in public and no legislation on this particular offense. It was an offense at common law because against good morals, against public decency; and cites Blackstone, "Any grossly scandalous and public indecency is indictable and punishable in the temporal courts by fine and imprisonment." 4 Black Com. 41. Wharton's says further, "In some instances the acts committed could also be punished as breaches of the public peace, and under some disorderly conduct statutes they must be such as disturb or tend to disturb the public peace." Com. v. Harris, 101 Mass. 29. Wharton states, Sec. 807, "The utterance of abusive, profane and insulting language, not accompanied by any immediate threat of vio-

lence, is not indictable at common law as a breach of the peace." St. Louis v. Slepsky, 254 Mo. 309, 162 S.W. 155, 149 L.R.A.(N.S.) 919.

17. Minnesota, in State v. Reynolds, 1954, 243 Minn. 196, 66 N.W. 2d 886, upheld the Brawling statute as defined in M.S.A. 615.17. We find the title refers to "disorderly conduct" and in the body of the act it sets forth the words "of brawling" which have a certain connotation of fighting and disturbance, directed toward a disturbance of the public peace and inciting to resentment, as different from mere use of a swear word without any disturbance whatsoever. The Reynolds case cites the Minnesota law applicable that it is definitely necessary an "offense must be stated in language sufficiently explicit so that men can know what is prohibited thereby and what it is their duty to avoid. Disorderly conduct generally means some act which tends to breach the peace or to disturb those people who may hear and see it. For a person to be guilty of disorderly conduct the public or some member thereof must be disturbed." (p. 198)

18. It is submitted that "disorderly conduct" is found only in the St. Paul Ordinance 469.02 relating to rioting, etc., in a house or building premises and could not apply in our case; and that in no wise could City Ordinance 438.02 as to riots be legally strained and extended, without any reference or definition therein, to cover an alleged offense of mere use of improper words. We submit the ordinance is unconstitutional under the State and Federal Constitutions and does not state an offense, as to simple use of an improper word, without any rioting or action akin thereto, under all of the sections of said Constitutions referred to herein.

19. We further submit that the defendant's constitutional and lawful rights, state and federal, have been violated in these proceedings, including a failure to set out the definite ingredients of the alleged offense in a proper complaint, and by forcing him to trial on a mere tab charge of disorderly conduct, without setting forth the nature of the charge, as required, either in the words of the statute or ordinance, or as to the facts themselves to define clearly the nature and basis of the charge.

20. Reference is hereby made to the various cases cited in our brief, and, by reference, we wish to incorporate herein the entire contents and reasoning, grounds and decisions, as set forth in the able and scholarly Dissent herein.

21. We endeavored, in our brief and in our arguments in the record of the trial, to show that the defendant could not be charged under the Riot ordinance and that the alleged offense could not be covered by the Disorderly House ordinance, and thought we had made it clear that we considered the ordinance was absolutely invalid and unconstitutional, and in violation of the requirements of the State and Federal Constitutions. We felt that on the face it was apparent, clearly, that the ordinance did not meet constitutional requirements and could not cover an alleged offense of simple misuse of an improper word.

22. We submit it is apparent, and we endeavor to show to the Court at this time, that this case involved four so-called "white" officers, illegally and unconstitutionally abusing the rights of so-called "colored" persons, including this defendant, and his brother who was illegally arrested, and the other couple. Inasmuch as the Court makes reference to it in the last paragraph of the Opinion, we would like to suggest that we do not have to wait further, for this is a case dealing squarely with this issue.

23. We did not feel it was necessary to emphasize or even mention this, other than what we thought the record clearly showed. We have come a long way in our relations with our fellow men and those of us who have traveled, either in person or by television and pictorial experience, and books, know that the greater proportion of the population of our earth doesn't have pinkish-white Caucasian skin, and we have to live in peace and justice with all men. May we suggest it is not necessary that a colored man have any more rights than a white man, and it is equally requisite that a white man should have as much rights as a colored man.

24. Finally, we submit the conduct of the defendant was not clearly encompassed within the terms of the ordinance invoked for his punishment, namely, that as to disorderly conduct in houses, nor as to riots and acts akin thereto. That the conviction was contrary to Minnesota Constitution, Article I, Sec. 7, and U. S. Constitution, Amendment XIV, and was therefore invalid. Further, that the proceedings as carried out against the defendant were invalid and unconstitutional as set forth herein, and contrary to U. S. Civil Rights Statutes as enacted. (U.S.C.A. Title 18, Chapter 13, Civil Rights §241, §242; Title 8, §42.)

25. We would appreciate, and ask that we be granted oral argument.

Respectfully submitted,

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August 10, 1960

(TITLE)

Sir: Take notice that the following order was entered in the above cause: Application for reargument having been filed herein, all further proceedings, except the taxation of costs, are stayed, pending further order.

August 11, 1960.

Yours respectfully,

MAE SHERMAN
Clerk of Supreme Court

(TITLE)

JUDGMENT

Pursuant to the order of the Court heretofore duly made and entered in this cause, it is determined and adjudged that the order of the Court below, herein appealed from, to-wit, of the Municipal Court within and for the County of Ramsey, City of St. Paul, be and the same hereby is in all things affirmed.

Dated and signed September 27, 1960.

By the Court:

Attest: MAE SHERMAN, Clerk

CITY OF SAINT PAUL, Respondent,

v.

Robert MORRIS, Appellant.

No. 37909.

Supreme Court of Minnesota.

July 22, 1960.

Rehearing Denied Sept. 27, 1960.

Defendant was convicted of disorderly conduct under city ordinance. The Municipal Court, City of St. Paul, Leonard Keyes, J., rendered judgment, and defendant appealed. The Supreme Court, Dell, C. J., held that use of foul, vulgar, and obscene expressions by defendant against police officers who had arrested defendant's half brother constituted "disorderly conduct" in violation of ordinance.

Affirmed.

Loevinger, J., dissented.

1. Ordinance 438.02 provides: "Any person or persons who shall make, aid or countenance, or assist in making any noise, riot, disturbance or improper diversion, to the annoyance or disturbance of the citizens, or other person or persons in said city; or who collect in bodies or crowds in any street or public place in said city, so as to obstruct public travel thereon, shall be guilty of a misdemeanor."

1. Disorderly Conduct ⇐1

Legislation relating to disorderly conduct also embraces acts which corrupt the public morals or outrage the sense of public decency. M.S.A. § 615.17.

2. Disorderly Conduct ⇐1

Use of foul, vulgar, and obscene expressions by defendant against police officers who had arrested defendant's half brother constituted "disorderly conduct" in violation of ordinance.

See publication Words and Phrases, for other judicial constructions and definitions of "Disorderly Conduct".

3. Municipal Corporations ⇐111(1)

Ordinance to effect that any person who shall make, aid, countenance or assist in making any noise, riot, disturbance or improper diversion to annoyance or disturbance of citizens shall be guilty of a misdemeanor was not unconstitutional as too vague or indefinite.

Syllabus by the Court.

The use of vile and obscene language toward police officers was of such a nature, under the circumstances here, as to outrage the sense of public decency and violated a city ordinance prohibiting disorderly conduct.

Otis H. Godfrey, Sr., St. Paul, for appellant.

Louis P. Sheahan, City Atty., Robert E. Fariey, Asst. City Atty., St. Paul, for respondent.

DELL, Chief Justice.

Defendant was convicted of disorderly conduct under St Paul City Ordinance 438.02.[1] He appeals from the judgment of conviction.

On January 10, 1959, at approximately 1:30 a. m., the defendant's half brother, Booker T. Parker, was arrested with two others on a charge of consuming liquor in a restaurant not licensed for such consumption. As the officers left the establishment and were leading the accused to the police car, the defendant walked behind them asking the officers why they were arresting his brother who, defendant claimed, had done nothing to warrant arrest. The defendant then said to the officers two or three times, "You white mother f—kers, what are you picking on us for, why don't you pick on the white people?" He was then placed under arrest. While it appears from the record that other persons were close enough to hear what was said, no claim is made that persons other than the officers did, in fact, hear the defendant's remarks or that, apart from the words referred to, the defendant created any disturbance.

Defendant contends that the use of abusive language toward a police officer does not, in itself, constitute disorderly conduct. In support of his argument he cites numerous authorities, particularly New York cases, holding that since an officer is charged with preserving the peace, offensive language directed solely toward an officer, however abusive or vile it may be, cannot be said to tend to provoke a breach of the peace. This largely fictional reasoning has been vigorously repudiated in other jurisdictions,[2] and not always followed in New York.[3]

[1, 2] Regardless of the merits of these cases they are of little significance since the conduct prohibited by the ordinance here involved is not limited to acts which tend to breach the peace or cause actual disturbance. It is the rule in this state, as it is generally elsewhere, that legislation relating to disorderly conduct also embraces acts which corrupt the public morals or outrage the sense of public decency.[4] Under the circumstances before us the foul, vulgar, and obscene expressions admittedly used by the defendant constituted conduct of such a nature. While it is obvious that not every abusive epithet directed toward police officers would be sufficiently disturbing or provocative to justify arrest for disorderly conduct, there is no sound reason why officers must be subjected to indignities such as present here, indignities that go far beyond what any other citizen might reasonably be expected to endure.

Since this opinion was written a dissent has appeared even though the only issue briefed and argued is the one disposed of by the majority opinion. Ordinance 438 is the only one involved. The trial and conviction in the court below as well as the briefs of both parties here were based on that ordinance. No other ordinance was mentioned.

[3] The question of whether the ordinance involved is sufficiently definitive to meet constitutional requirements was not argued by the defendant. Nevertheless it is clear from our discussion in State v. Reynolds, 243 Minn. 196, 66 N.W.2d 886, in which we held that the offense of "disorderly conduct," as defined in M.S.A. § 615.17, was not too vague or indefinite that an ordinance of the type here involved is also sufficiently certain to meet objections on constitutional grounds.

Nor can we adopt the suggestion made in the dissenting opinion that the foul and vulgar expletive here used became inoffensive only because it was addressed by

2. See Pavish v. Meyers, 120 Wash. 695, 225 P. 633, 34 A.L.R. 561, and the authorities cited therein.

3. Compare People v. Lukowsky, 94 Misc. 500, 159 N.Y.S. 599, relied upon by the defendant, with People v. Fenton, 102 Misc. 43, 168 N.Y.S. 725.

4. State v. Reynolds, 243 Minn. 196, 66 N.W.2d 886; 2 Wharton, Criminal Law and Procedure, § 805.

5. Under M.S.A. § 615.17 every person who "engages in brawling or fighting" is guilty of disorderly conduct.

colored person to a Caucasian officer and referred to the "white" race. While each case must rest upon the probable and natural consequences of the defendant's own conduct, under the particular facts involved, we have no doubt that the expression would be equally provocative and offensive to any citizen, regardless of race.

No racial issue was raised in this appeal, and as pointed out in footnote 17 of the dissent, the record does not even show that the defendant and his companions were of the colored race while the officers were of the Caucasian race. We think it would have been a great deal better, and certainly far more judicial, to have waited until a case was presented to us dealing squarely with this issue than to inject it, as was unfortunately done here, through the dissent.

The defendant's other assignments, dealing with procedural matters only, have not been briefed or argued. In any event they are without merit.

Affirmed.

LOEVINGER, Justice (dissenting).

This case presents the issue whether using an obscene expletive to a policeman sustains a conviction for "disorderly conduct" under the ordinances of St. Paul. Behind this apparently simple issue lurk considerations of basic importance in the relationship of government to individual. These deserve careful examination and therefore require extended discussion.

The liberty of the individual, which is rightfully one of the proudest possessions of the American people, is largely a freedom from arbitrary action by those possessed of the power of government. This is so important a matter to our people that the very structure of the government itself was formed to secure this end. The powers of government were divided among legislative, executive, and judicial branches to insure, so far as any device could do so, against abuse, arbitrary exertion, or usurpation of power.[6]

6. The idea of guarding against abuse of power by dividing the power of government into three functional branches is generally assumed to have originated with Baron de Montesquieu. In his great work, "The Spirit of Laws," first published in 1748, Montesquieu said (book 11, cc. 4 and 6):

"* * * Political liberty * * * is there only when there is no abuse of power: but constant experience shews us, that every man invested with power is apt to abuse it; he pushes on till he comes to something that limits him.

"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

"Again there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.

"There would be an end of every thing, were the same man, or the same body, whether of the nobles or of the people to exercise those three powers, that of enacting laws, that of executing the public resolutions, and that of judging the crimes or differences of individuals."

It is generally conceded that the ideas of Montesquieu were the principal intellectual influence in bringing the constitutional convention to adopt the scheme of government involving this division of powers. See, e. g., James M. Beck, "The Constitution of the United States," p. 222.

A century after adoption of the constitution, James Bryce in his classic work, "The American Commonwealth," remarked (1891 ed., vol. 1, p. 290):

"All the main features of American government may be deduced from two principles. One is the sovereignty of the people, * * *.

"The second * * * is the distrust of the various organs and agents of government. The States are carefully safeguarded against aggression by the central

This concept has roots deep in our legal history. In the Magna Charta signed by King John at Runnymede in 1215, it was promised that no freeman should be penalized unless "by the law of the land."[7] It is now generally agreed that these words were intended to secure the individual from the arbitrary exercise of the powers of government.[8] This specific guarantee of Magna Charta has been carried into our constitutional law in the prohibition against the deprivation of life, liberty, or property without "due process of law." These words have the same meaning as the phrase "by the law of the land" used in Magna Charta in the thirteenth century.[9] This basic requirement that government proceed by due process of law has been a part of the Bill of Rights of the Minnesota constitution since it was approved by the people in 1857.[10] The same provision has been a part of the Federal Constitution since ratification of the Bill of Rights in 1791 as a standard for the Federal government,[11] and as a standard for state governments since ratification of U.S.Const. Amend. XIV in 1868.[12]

This ancient and basic concept of American government has been developed and refined over the years by numerous applications and expositions. Through these it has come to be recognized as imposing certain specific minimum requirements for governmental action. Essentially these require that all three branches of government act in their respective capacities before a penalty is imposed. The legislative branch must define the offense and stipulate the penalty by proper enactment. The executive branch must apprehend the offender, institute prosecution, and present evidence showing a violation of the legislative enactment. The judicial branch must consider the charge and the evidence impartially and reach a reasoned determination that the evidence establishes violation of the legislative enactment.

These requirements are sometimes called "technical," and they may be. Nevertheless, they are the means by which the ancient and basic guarantee against arbitrary government action inflicting a penalty or curtailing individual liberty is made effective. The courts have no more important function in our system of government than the maintenance of this principle in unimpaired vitality and the application and enforcement of the technical requirements by which this purpose is secured.

It has been repeatedly held that it is fundamental to due process of law that no person be penalized except for commission of an offense which was clearly forbidden and defined by legislative enactment. While mathematical precision is not required, the legislative definition of an offense must be specific enough to give fair notice of what is forbidden to men of common intelligence and to provide a reasonably certain guide to the lawyer defending the person charged and the judge engaged in applying the law.[13] State action failing

government. So are the individual citizens. Each organ of government, the executive, the legislature, the judiciary, is made a jealous observer and restrainer of the others. Since the people, being too numerous, cannot directly manage their affairs, but must commit them to agents, they have resolved to prevent abuses by trusting each agent as little as possible, and subjecting him to the oversight of other agents, who will harass and check him if he attempts to overstep his instruction."

7. Magna Charta, par. 39, 1 M.S.A. pp. 109, 114.

8. Bank of Columbia v. Okely, 4 Wheat. 235, 244, 17 U.S. 235, 244, 4 L.Ed. 559, 561.

9. Den ex dem Murray v. Hoboken Land & Improvement Co., 18 How. 272, 59 U.S. 272, 15 L.Ed. 372.

10. Minn.Const. art. 1, § 7, M.S.A.

11. U.S.Const. Amend. V.

12. U.S.Const. Amend. XIV.

13. United States v. L. Cohen Grocery Co., 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516, 14 A.L.R. 1045; and cases cited in

to meet this standard violates both the Minnesota constitution[14] and the Federal Constitution.[15]

It is generally stated that the reason for this rule is to give fair notice to all individuals as to what conduct will render them subject to penalties.[16]

However, an equally important consideration appears to be that this requirement minimizes the opportunity for abitrary action by executive and judicial officers of government. When penalties are imposed for offenses that are vaguely defined, then the police agencies become legislators and the courts are powerless to check abuses except by arrogating legislative authority to themselves. On the other hand, when penal laws are reasonably specific and definite, then police agencies, as well as the people, have guidance to recognize illegal conduct without resorting to their own ideas of what is proper or improper, and the courts similarly have standards by which to judge.

In the instant case defendant was in a restaurant when police officers arrested several other individuals in the restaurant, including defendant's half brother, on a charge of consuming liquor in an unlicensed establishment. As the officers were leaving the restaurant the defendant walked behind them and asked why they were arresting his brother. One of the officers told defendant to shut up, whereupon defendant referred to the officers as white so-and-so's, using an obscene expletive, and said they were picking on the colored people.[17] Defendant used a normal tone of voice, and there was no noise, fighting, violence, or threat of violence.[18] The officers then arrested defendant. He was arraigned on a "tab charge" of committing "the crime of

14. State v. Moseng, 254 Minn. 263, 95 N.W.2d 6; State v. Hayes, 241 Minn. 286, 70 N.W.2d 110; State v. Suess, 236 Minn. 174, 52 N.W.2d 409; State v. Northwest Poultry & Egg Co., 203 Minn. 438, 281 N.W. 753.

15. Winters v. People of State of New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840; Connally v. General Const. Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322; International Harvester Co. of America v. Commonwealth of Kentucky, 234 U.S. 216, 34 S.Ct. 853, 58 L.Ed. 1284; cf. concurring opinion of Mr. Justice Frankfurter in Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098.

16. See cases cited in footnotes 8, 9, and 10, supra.

17. The record gives several versions of defendant's remark. One arresting officer testified defendant said: "You white _____ _____, what are you picking on us for, why don't you pick on the white people?" Another officer testified the defendant said, "Why are you white _____ _____ picking on us?" Another officer testified the defendant said, "You white _____ _____, what are you doing up here bothering the colored people?" The testimony of the officers agrees with respect to the use of the term "white" and the epithet. For reasons stated in the opinion the precise character of the epithet is not considered important. Although the record does not state this explicitly, it seems reasonably obvious that the defendant and his companions were of the Negro race and the officers were of the Caucasian race.

18. One officer testified defendant "didn't make any noise or do any fighting, other than just that word. He was very peaceful from there on, and except to say that, he was peaceful before." (Record p. 4). Another officer was asked, "There was no rioting or fighting whatsoever other than just the mere statement of the words?" He answered, "No, there was no fighting or anything else," and to the question, "Just that word to you officers?" answered, "That is right." A third officer testified that the defendant caused "no" disturbance," and "no fighting, quarreling or anything like that," and no "riot, fighting or other disturbance, or noise." (Record pp. 10, 11, and 12). A witness for defendant testified that he used "a normal voice. I mean it wasn't shouted or loud or anything; an ordinary conversational voice." (Record p. 18). None of this testimony was disputed.

disorderly conduct." [19] After a hearing before a municipal judge without a jury, the judge entered "a finding of guilty under the ordinance." [20] There is no further specification of the charge. It is apparently assumed by counsel trying the case and by the opinion of this court that defendant was charged with violation of St. Paul City Ordinance 438.02.

Examination of the St. Paul city ordinances discloses that there are two sections indexed to the heading "Disorderly Conduct." Ordinance 469.02 prohibits "rioting, quarreling, fighting, revelling, drunkenness, or any other disorderly conduct * * *." [21] This section, however, is confined to acts committed in a house or building or on premises occupied by the defendant. It appears in a chapter relating to "Disorderly Houses." Since defendant in the present case is not charged with doing any act in any house, building, or premises occupied by him, Ordinance 469.02 clearly has no application.

Ordinance 438.02 is headed "Riots." It makes it a misdemeanor to make "any noise, riot, disturbance or improper diversion * * *." [22] Ordinance 438.02 does not contain the words "disorderly conduct" or any reference to that term. There is a serious question whether the charge against the defendant was proper and whether he may be found guilty of violating Ordinance 438.02 under this charge. It has been held that "disorderly conduct" is too vague a phrase to define an offense.[23] Further, this court has held that a charge in substantially the language of Ordinance 438.02 does not charge the commission of any specific act constituting an offense, and is, therefore, insufficient to sustain a conviction.[24] However, passing this point, there are more important reasons why this conviction should not be permitted to stand.

Although defendant was charged with "the crime of disorderly conduct," he can be convicted only of violating some specific ordinance. There are no common-law crimes in this state,[25] and disorderly conduct is not a crime at common law in any event.[26] Consistently with constitutional due process of law, defendant can be convicted only of an offense established and defined by legislative enactment. It is, therefore, irrelevant that defendant may have been charged with "disorderly conduct." Likewise, decisions containing expansive discussions of disorderly conduct are irrelevant to this case.[27] Neither this

19. Record pp. 1 and 2.

20. Record p. 26.

21. St. Paul City Ordinance 469.02 reads as follows:
"Disorderly Conduct. No person or persons within the City of St. Paul, shall commit or suffer to be committed, in any house or other building or premises by him, or her, or them occupied, any rioting, quarreling, fighting, revelling, drunkenness, or any other disorderly conduct, calculated to disturb the neighborhood, or annoy travelers or others."

22. St. Paul City Ordinance 438.02 reads as follows:
"Riots. Any person or persons who shall make, aid or countenance, or assist in making any noise, riot, disturbance or improper diversion, to the annoyance or disturbance of the citizens, or other persons or persons in said city; or who collect in bodies or crowds in any street or public place in said city, so as to obstruct public travel thereon, shall be guilty of a misdemeanor."

23. Griffin v. Smith, 184 Ga. 871, 193 S.E. 777.

24. State v. Swanson, 106 Minn. 288, 119 N.W. 45.

25. State v. Cantrell, 220 Minn. 13, 18 N.W.2d 681; State ex rel. Thurston v. Sargent, 71 Minn. 28, 73 N.W. 626.

26. State v. Reynolds, 243 Minn. 196, 66 N.W.2d 886; Lewis v. Commonwealth, 194 Va. 69, 34 S.E.2d 389; 27 C.J.S. Disorderly Conduct, § 1.

27. It is noteworthy that "disorderly conduct" does not mean merely offensive conduct. Commonwealth v. Lombard, 321 Mass. 294, 73 N.E.2d 466.
Cases on opprobious words addressed to a policeman as breach of the peace are collected in Annotation, 34 A.L.R. 508.

court nor the court below is privileged to legislate by reading either the term or the concept of disorderly conduct into an ordinance which makes no reference to them.[28] Evidence as to defendant's offense must be measured by the explicit terms of the ordinance, if any, applicable to this case.

We must consider, therefore, whether the use of an obscene expletive in and of itself is an illegal "noise, riot, disturbance or improper diversion."

It is a matter of common knowledge, readily verified by reference to the dictionary, that the word "noise" refers to clamor, din, or uproar, or to sound that is objectionable by reason of its volume or discordant quality. It certainly does not apply to sound that is offensive merely because of the import of the words used or the sense conveyed. Courts that have considered the matter, including this court, have held that noise, in such a context, refers to more than audible sound, and means sound which is disturbing to others because of its volume, such as shouting upon the streets at night.[29]

The term "riot" has a well-established and recognized legal meaning, which is a tumultuous disturbance of the peace by three or more persons acting with a common purpose in a violent and turbulent manner.[30] The statutes of this state[31] and the views of this court are consistent with this definition.[32] It is true that the term "riot" is sometimes used in current popular speech with a somewhat less technical meaning. In this sense the term "riot" may be equivalent to the colloquialism "rumble," which has been said to mean a gang fight.[33] In any event, it is clear that the term "riot" refers to an event involving more than one person and involving action of a violent character.

The term "disturbance" also has an established legal significance. As used in the law, disturbance connotes civil commotion and means conduct which interferes with or interrupts a peaceful assembly of others.[34] Although the term "disturbance" is a broad one with numerous other meanings,[35] as used in the context of an enactment having to do with noise or riot, the term is apparently a shorthand expression for the common-law offense of the disturbance of public meetings.[36] It has been held that the term "disturbance" as used in a context such as that here means conduct which is itself so disorderly that it amounts to civil commotion and does not mean conduct which merely causes others to be disturbed.[37] The word "disturbance" is

Cases on words as a criminal offense other than libel or slander are collected in Annotation, 48 A.L.R. 83. No case cited appears to consider the precise issue presented in this case, although Anderson v. City of Camden, 52 N.J.L. 289, 19 A. 539, holds that indecent language is not a violation of an ordinance very similar to the one involved here.

28. Lewis v. Commonwealth, 184 Va. 69, 34 S.E.2d 389.

29. State v. Cantieny, 34 Minn. 1, 24 N.W. 458; City of Bismarck v. Anderson, N.D., 71 N.W.2d 457; Vassil v. Molnar, 133 N.J.Eq. 577, 33 A.2d 743.

30. Salem Mfg. Co. v. First American Fire Ins. Co., 9 Cir., 111 F.2d 797; Walter v. Northern Ins. Co., 370 Ill. 283, 18 N.E. 2d 906, 121 A.L.R. 244; International Wire Works v. Hanover Fire Ins. Co., 230 Wis. 72, 283 N.W. 292; 77 C.J.S., Riot, § 1.

31. M.S.A. § 615.02.

32. State v. Winkels, 204 Minn. 466, 283 N.W. 763.

33. State v. Miller, 253 Minn. 112, 91 N.W. 2d 138.

34. State v. Stuth, 11 Wash. 423, 39 P. 965; State v. Mancini, 91 Vt. 507, 101 A. 581; Fowler v. State, 93 Ga.App. 883, 93 S.E. 2d 183.

35. 27 C.J.S., p. 815.

36. 27 C.J.S., Disturbance of Public Meetings, § 1.

37. Fowler v. State, 93 Ga.App. 883, 93 S.E.2d 183. In Anderson v. City of Camden, 52 N.J.L. 289, 19 A. 539, 540,

undoubtedly used also in a less technical popular sense. However, in this sense it means a brawl, tumult, or commotion which does not amount to a riot.

The word "diversion" does not appear to have any contemporary meaning relevant to this subject. The literal meaning of the term is of a turning aside. The popular meaning is of an amusement or recreation. The term may have been used in an archaic sense, now unknown, since the language of this ordinance is more than a century old.[38] The legislative history suggests that the term was either a synonym for "disturbance" or was essentially meaningless.[39] In any event, the term must now be read as having a meaning similar to "noise, riot, or disturbance." This is required by the rule of ejusdem generis which is especially applicable to the definition of criminal offenses.[40] Further, since due process requires that the legislative definition of an offense give fair notice of the conduct that is forbidden,[41] it follows that the language of the definition must be intelligible to a man of common learning. Definitions of criminal offenses cannot be couched in esoteric or archaic terms that make them traps for the ordinary man. They must give fair warning to average men as well as to antiquarians and legal scholars. Consistently with this view, it has been held that conduct which is not a noise, riot, or disturbance does not constitute an "improper diversion" even though it may be immoral and illegal.[42]

it was held that a complaint alleging utterance of indecent words did not charge violation of an ordinance prohibiting "noise, riot, disturbance or breach of the peace."

38. The substance of Ordinance 438.02 first appears in the St. Paul ordinances as Ordinance 4, § 2, approved June 29, 1858. It there reads as follows:

"Any person or persons who shall make, aid, countenance or assist in making any noise, riot, disturbance, or improper diversion; and all persons who shall collect in bodies or crowds in said city for unlawful purposes, to the annoyance or disturbance of the citizens or travelers, shall, for each offense, on conviction before the said City Justice be liable to the the punishment and penalties provided in section one of this ordinance."

The marginal title of this section is "Breaches of the peace &c."

By Ordinance 40, approved October 7, 1869, this section was made to read as follows:

"Any person who shall make, aid or countenance, or assist in making any noise to the disturbance of the inhabitants or other persons in said city, or make, aid or encourage any riot, disturbance or improper diversion, to the annoyance or disturbance of the citizens or other person or persons in said city, and all persons who shall collect in bodies or crowds in said city, for any unlawful purpose, to the annoyance or disturbance of the citizens, or other person or persons, shall, for each offense, on conviction before the said City Justice, be fined in any sum not exceeding one hundred dollars, to which may be added, in the discretion of the City Justice, imprisonment not to exceed three months."

Ordinance 1475, approved February 18, 1891, repealed Ordinance 40, and § 2 of the new ordinance, under the marginal title "Riot, disturbance, etc.," contained the language now set forth in Ordinance 438.02.

39. The language of the successive versions of this ordinance is set forth in footnotes 38 and 22, supra. Note particularly the language of the 1869 version.

Sir Frederick Pollock, in "A First Book of Jurisprudence," c. 7, p. 334, aptly noted that: "About the end of the last century the only art of the parliamentary draftsman was to pile up as many words as possible, significant and insignificant, on the chance that in their multitude the intention of the enactment might find safety."

40. State v. End, 232 Minn. 263, 45 N.W.2d 378.

41. See cases cited in footnotes 13, 14, and 15, supra.

42. City of Chicago v. Murray, 333 Ill. App. 233, 77 N.E.2d 452. In that case defendant committed adultery in such circumstances that her husband shot and killed her partner. It was held that the adultery did not constitute an offense under an ordinance similar in all material respects to that involved here

Thus, a rational analysis demonstrates that the use of expletives, without violence or threat of violence, is not within the legal, the popular, or the literal meaning of any of the terms "noise," "riot," "disturbance," or "diversion." However, the record is clear that the defendant was not guilty of any noise, riot, fighting, or disturbance other than the utterance of the objectionable expletive in a normal tone of voice.[43]

If offensive utterances that are not loud, violent, or tumultuous can be held to violate this ordinance, then anything offensive to a policeman and municipal judge is within its scope with equal logic. In that case, punishable conduct is merely that which sufficiently displeases a judge. This is purely arbitrary power, not a rule of law.

The power is arbitrary not because the judge's ideas are aberrant or at variance with community attitudes, but because the standard of legality is the judge's idea, rather than a legislative standard. Arbitrary, in this context, means fixed or done at pleasure or will, and not governed by established rules, standards, or adequate determining principles.[44] Protection of the individual against arbitrary government action is the very essence of due process.[45] The cut of such constitutional principles is not confined to great causes and prominent parties but applies with equal force to prevent the imposition of a small fine on an obscure defendant under a municipal ordinance by unreasonable extension of the terms of the ordinance.[46] Thus the instant case presents precisely the type of situation in which the application of these constitutional principles is historically appropriate and logically necessary.

Nevertheless, it is difficult to be altogether rational in responding to an emotional exclamation that is obviously intended as an affront. Those with skins of that peculiar yellowish-pink color that is called "white" in the contemporary vernacular are unused to racial denigration and insults. Thus, it comes as a severe shock to have the term "white" used in a derisive sense. When it is coupled with a derogatory and offensive expletive, the shock turns to indignation which regards this as obscene or even blasphemous. The natural inclination is to feel that if an execratory expletive is offensive enough it must be illegal regardless of "technicalities." The difficulty is that it is quite impossible to determine how offensive any particular expression is. To begin with, curses, oaths, expletives, execrations, imprecations, maledictions, and the whole vocabulary of insults are not intended or suceptible of literal interpretation. They are expressions of annoyance and hostility —nothing more. To attach greater significance to them is stupid, ignorant, or naive. Their significance is emotional, and it is not merely immensurable but also variable. The emotional quality of exclamations varies from time to time, from region to region, and as between social, cultural, and ethnic groups. The standards of verbal behavior of those social

43. See testimony cited in footnote 18, supra.

44. Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220; Paul v. Board of Zoning Appeals, 142 Conn. 40, 110 A.2d 619; Canada Dry Ginger Ale, Inc. v. F & A Distributing Co., 28 N.J. 444, 147 A.2d 15; also see, Baisden v. Floyd County Board of Education, 270 Ky. 839, 110 S.W.2d 671; Goodrum v. State, Tex. Civ.App., 158 S.W.2d 81; Eureka Bldg. & Loan Ass'n v. Myers, 147 Kan. 609, 78 P.2d 68; Central of Georgia Ry. Co. v. Mote, 131 Ga. 106, 62 S.E. 164; In re Housing Authority, 235 N.C. 465, 70 S.E. 2d 500; Turbeville v. Morris, 203 S.C. 287, 26 S.E.2d 821.

45. Slochower v. Board of Higher Education, 350 U.S. 551, 76 S.Ct. 637, 100 L. Ed. 692.

46. Thompson v. City of Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654.

groups within which judges move are not fairly applicable to the entire population.[47]

The very violence of feeling aroused by an offensive expression should warn judges of the dangers of being injudicious and of the impropriety of determining legal significance by their own reactions or feelings. The mere fact that acts or words are offensive does not mean that they are "disorderly" or within that special category of disorderly described as noise, riot, disturbance, or diversion. This has been held in cases in which the conduct complained of was apparently less offensive than here.[48] It should be noted that this principle does not prevent the legislature from passing a proper enactment forbidding the use of language that threatens a breach of the peace.[49]

These principles cannot be disregarded merely because a particular verbal expression is *very* offensive to the judiciary. Before the judiciary may impose punishment for any conduct, other than contempt of court, offenses must be defined by the legislature. It is a bald arrogation of legislative power for courts to rewrite or extend the meaning of penal enactments. Such an exercise of power is purely arbitrary since it depends entirely on the subjective inclination of the judge which is not known or knowable in advance, and which is not exercised in accordance with any established principle or rule. The imposition of a penalty in this manner is not according to due process of law or the law of the land.

Since the conduct of defendant here was not clearly encompassed within the terms of the ordinance invoked for his punishment, the conviction was contrary to Minn.Const. art. 1, § 7, and U.S.Const. Amend. XIV, was therefore invalid, and should be reversed.

47. The particular expression found objectionable here and abhorrent to every member of this court, including the writer of this opinion, is reputedly not uncommon among certain social groups.

48. State v. Korich, 219 Minn. 268, 17 N.W.2d 497; City of Chicago v. Murray, 333 Ill.App. 233, 77 N.E.2d 452; Commonwealth v. Lombard, 321 Mass. 294, 73 N.E.2d 465; cf. Terminiello v. City of Chicago, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131. In this latter case speech that was in some respects more offensive, because more deliberate, than that involved in the present case, and which actually resulted in violence, was held not to constitute a violation of an ordinance substantially the same as that involved here. The decision was put upon the grounds that the speech was protected by the constitutional right of free speech. However, it should be noted that this invokes the due-process clause of U.S. Const. Amend. XIV, which, in the view expressed here, also interposes a bar to application of substantially the same ordinance to the facts in the present case.

49. Chaplinsky v. State of New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031. There is a statute in Minnesota substantially similar to that which was held valid in the foregoing case. M.S.A. § 615.15.